Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of BellSouth Telecommunications, Inc.'s Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers	WC Docket No. 03-251

COMMENTS OF SBC COMMUNICATIONS INC. IN RESPONSE TO NOTICE OF INQUIRY

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INTRODUCTION AND SUMMARY

IA. The Commission's Notice of Inquiry ("*NOI*")[1] asks about the "competitive consequences" of broadband service bundles. The answer is simple: communications service bundles – including broadband Internet access bundled with "legacy" services – reflect the ordinary workings of the marketplace and are enormously pro-competitive. Study after study documents consumers' growing desire for the cost savings and simplicity that come with such bundles. In fact, a recent survey reported that 51 percent of households *already* choose bundles of at least two communications services and found that "customers who bundle services report higher overall satisfaction than those who are not bundling services."[2] Thus, it is no surprise that communications providers of all stripes are locked in an intensely competitive battle to provide consumers with bundled services.

Indeed, the very existence of that battle – pursuant to which telcos, cable operators, satellite providers, CLECs, IXCs, wireless providers and others are investing mightily to offer service bundles – is perhaps the best evidence that the 1996 Act's promise of intermodal competition is being realized. Just this month, SBC – responding in large part to the aggressive efforts of the cable providers to market a voice/video/data bundle – announced that customers could purchase xDSL-based broadband Internet access, as part of a bundle with voice, for $14.95 per month. Bundling is surely, as Commissioner Abernathy has put it, a "boon for consumers."[3]

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[1] Memorandum Opinion and Notice of Inquiry, *BellSouth Telecommunications, Inc.'s Request for Declaratory Ruling*, 20 FCC Rcd 6830 (2005).

[2] Press Release, J.D. Power and Associates, *J.D. Power and Associates Reports: Customer Satisfaction Increases as Stiff Rate Competition and Bundling Cause Steep Drops in Long Distance Spending* (July 1, 2003) ("J.D. Power Release").

[3] Kathleen Q. Abernathy, Commissioner, FCC, *Preserving Universal Service in the Age of IP*, Remarks at the University of Colorado at Boulder, Boulder, CO (Oct. 21, 2004) ("Abernathy Univ. Colo. Remarks").

B. Bundling is also fully consistent with the Commission's statutory mandates – set forth in the plain language of sections 7, 706, and 230 of the 1996 Act – to encourage the deployment of broadband infrastructure, to promote the introduction of new technologies and services, and to ensure the continued development of the Internet in a pro-competitive, deregulatory environment. The ability of service providers to bundle broadband services with legacy services made possible the enormous investments that carriers have undertaken to promote the widespread availability of broadband, just as Congress contemplated in section 706 of the 1996 Act. With that widespread deployment, moreover, have come new services and technologies that providers are able to market in a deregulated environment consistent with Congress's command "to preserve the vibrant and competitive free market that presently exists for the Internet."[4]

And that is only the beginning. Prompted by the rush of competition enabled by the 1996 Act, SBC recently announced a plan to spend $4 billion to push fiber deep into its networks, an investment that will permit the company to provide consumers an array of IP-enabled broadband services. That pro-competitive investment – which promises enormous benefits to consumers and which is precisely the sort of step that the 1996 Act commands the Commission to encourage – makes sense precisely because SBC will be permitted to use its new network to package services as the market demands.

C. Not only does bundling provide tremendous benefits to consumers, but there is no plausible claim that broadband bundles could cause competitive harm. In their comments on the BellSouth declaratory ruling petition that gave rise to the *NOI*, commenters alleged that

[4] 47 U.S.C. § 230(b).

competition is being diminished by the ILEC practice of selling xDSL-based broadband Internet access *only* as a mandatory bundle with voice service. But, if consumer demand justifies the cost of developing and marketing standalone broadband, the marketplace will provide it. In fact, notwithstanding the additional costs that ILECs alone face in light of today's disparate regulatory environment, several ILECs are already working to provide an xDSL-based standalone broadband product. And the suggestion that the prior absence of such a product has inhibited the deployment of services that rely on a broadband connection – *i.e.*, VoIP – is belied by the fact that VoIP providers such as Vonage have posted staggering customer gains in the last year.

II. The Commission also asks about potential "remedies" for any anticompetitive concerns associated with bundling. But, quite apart from the fact that there are no such concerns, the only remedy that any commenter has suggested to date – the forced provision of "naked" broadband Internet access – is both unnecessary and counterproductive. Because there is plainly no coherent basis for singling out the nondominant, second-to-market ILECs, any such regulatory mandate would self-evidently have to apply across-the-board to *all* broadband providers. Yet the Commission has long recognized that such heavy-handed intervention is inappropriate where, as here, the market is robustly competitive. That principle applies with added force here, moreover, in view of the fact that broadband Internet access is an "enhanced" or "information" service. The Commission has spent the better part of three decades laboring to keep such services free from regulation, and the market is functioning as it should. It would be a giant step backwards if the Commission were to now substitute its judgment for that of the market and force the provision of standalone broadband service, with all the interventionist regulation that such forced provision would entail.

In any case, Commission precedent teaches that service can be compelled only where there is market power, which the Commission has concluded is not the case in the broadband arena. And such forced provision would also squarely contradict the statutory mandates discussed above, which require the Commission to encourage broadband deployment and the development of new technologies and the Internet through *de*regulatory measures.

III. In their comments on BellSouth's petition, CLECs and others claimed that the practice of bundling broadband with voice – and not offering a standalone broadband product – constituted unlawful tying in violation of the antitrust laws. But the claim that the practice at issue constitutes tying turns the law upside down. Tying requires the existence of market power in the tying product. Here, the alleged tying product is broadband Internet access, which Chairman Martin has rightly observed is characterized by "fierce competition."[5] Where a consumer seeks ILEC-provided local *voice* service, he can get it on a standalone basis.

Nor can it be contended that bundling broadband service with voice is an exclusionary practice that preserves ILECs' alleged power over local voice services. To the extent ILECs gain efficiencies by providing voice and broadband service over a single line and offering a broadband/voice bundle, those efficiencies are the product of innovation and investment that should be encouraged. As the Commission has stressed in the unbundling context, nothing stops competing providers from offering their own competing bundles, which is precisely the innovative, pro-investment behavior the Commission should encourage.

[5] Kevin J. Martin, Commissioner, FCC, Remarks to the NARUC Conference, Washington, D.C. (Mar. 8, 2004) ("Martin NARUC Conference Remarks").

DISCUSSION

I. THE "COMPETITIVE CONSEQUENCES" OF BUNDLING ARE OVERWHELMINGLY POSITIVE

The Commission asks first and foremost about the "competitive consequences" of bundling new services with "legacy services." *NOI* ¶ 37. Those consequences are overwhelmingly positive. Product bundling – including bundling broadband service with legacy services, such as the voice services traditionally offered by LECs or the video services traditionally offered by cable companies – is enormously beneficial to consumers, who benefit from the lower prices and simplicity associated with packaged services and, critically, who are increasingly demanding more of the same. The ability to bundle services as consumers demand also drives the deployment of broadband infrastructure and the introduction of new technologies, as well as the continued development of the Internet, and it therefore promotes federal policy as set forth in the 1996 Act. Finally, there is no plausible claim of competitive harm that stems from mandatory broadband bundles. Service providers are responding to consumer demand for broadband services – including nascent demand for "naked" broadband Internet access – and indeed the services (such as VoIP) that rely on a broadband connection are growing explosively, thus belying the claim that limitations on naked broadband frustrate competition.

A. Bundling Benefits Consumers and Facilitates Congress's Goal of Intermodal Competition

A decade ago, consumers chose each of their communications providers from within a silo. Video service was provided by cable companies (or, to some degree, satellite providers); phone service was provided by phone companies; and Internet service was provided by Internet companies. The overarching goal of the 1996 Act was to change that. By eliminating legal

restrictions on entry,[6] Congress intended to facilitate robust, intermodal competition. Furthermore, Congress expected this intermodal competition, coupled with "reduce[d] regulation," "to . . . encourage the rapid deployment of new telecommunications technologies."[7]

The communications bundles that are available to consumers in today's marketplace are perhaps the best evidence that certain aspects of the 1996 Act are working as Congress planned. Cable companies no longer provide just cable service. On the contrary, all of the major cable operators aggressively market high-speed Internet services bundled with traditional video services, and most of them have added discounted voice service as well, thereby creating a marketing "triple play" that they are aggressively pushing nationwide.[8] Similarly, Bell companies have rolled out a voice and data service bundle (along with standard calling features such as caller ID and call forwarding),[9] some of them have added wireless to the mix,[10] and most of them are investing enormous amounts to deploy an IP-based video offering to compete head-

[6] *See* 47 U.S.C. § 253(a).

[7] 1996 Act Preamble, 110 Stat. 56.

[8] *See, e.g.*, Comcast, *Select a Package, at* http://www.comcast.com/Buyflow/default.ashx?LocResult; Cox Communications, *Bundled Services*, *at* http://www.cox.com/Digitalservices/; Time Warner, *Packages & Pricing, at* http://www.timewarnercable.com/piedmonttriad/products/packagesprices/default.html; Richard Bilotti, *et al.*, Morgan Stanley, *Broadband Update: Competition Varies Dramatically Across Regions* at 9 (Apr. 15, 2005).

[9] *See* SBC, *Bundle Selector, at* http://configurator.sbc.com/acct_cfg/SBCSelector/AppUI/BMSFrontAppUI/content/residential/splash_files/splash.jsp (*"SBC Bundle Sector")*; Verizon, *Verizon Freedom Packages, at* http://www22.verizon.com/pages/unlimited/?LOBCode=001a1&PromoSrcCode=V&POEId=VUISP; BellSouth, *BellSouth Products and Services*, *at* http://www.bellsouth.com/apps/ipc/ICReqDispatcher ("*BellSouth Products and Services*"); Qwest, *Residential: Qwest Choice Bundles*, *at* http://www.qwest.com/residential/bundles ("*Qwest Choice Bundles*").

[10] *See SBC Bundle Selector*; *BellSouth Products and Services*; *Qwest Choice Bundles*.

to-head with cable.[11] For their part, competitive wireline providers market bundles of voice and data services as well, as confirmed by the recent Earthlink/Covad announcement promising high-speed Internet access and VoIP.[12] And satellite carriers, such as DirectTV, bundle data service with their core offering (video),[13] as do VoIP providers, which stress the fact that they provide not only (bundled) local/long-distance, but a host of innovative features that come packaged with the core voice capability.[14]

Indeed, the market that is "by far the most competitive and innovative . . . in the Commission's purview" – the wireless market – is characterized almost entirely by product bundles.[15] Wireless providers bundle local and long-distance calling service with various calling features and handsets, and they increasingly are adding data access to the package.[16] With the

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[11] *See infra* pp. 13, 27.

[12] Press Release, EarthLink, Inc., *EarthLink and Covad Announce Market Trial of Innovative Bundle of Phone Services and High-Speed Internet* (June 6, 2005) ("Earthlink/Covad Press Release"). *See also, e.g.*, RCN, *Bundled Services*, *at* http://www.rcn.com/services/index.php?bundles; Cavalier Telephone, *High-Speed DSL for Residential Customers*, *at* http://www.cavtel.com/homeservice/DSL_%20residential.shtml.

[13] *See, e.g.*, DirecWAY, *Add DirecTV*, *at* http://hns.getdway.com/dtv.html; DirecTV, *DirecTV and DSL: A Perfect Match*, *at* http://www.directv.com/DTVAPP/imagine/InternetAccess.dsp; Dish Network, *EarthLink DSL*, *at* http://www.dishnetwork.com/content/products/internet/earthlink/dsl_code/index.shtml.

[14] *See, e.g.*, Vonage, *Premium Unlimited Plan*, *at* http://www.vonage.com/products_premium.php; Vonage, *Features*, *at* http://www.vonage.com/features.php?lid=nav_features; Packet8, *Service Plans*, *at* http://www.packet8.net/about/residential.asp; Packet8, *Features*, *at* http://www.packet8.net/about/features.asp.

[15] Ninth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, FCC 04-216 (rel. Sept. 28, 2004), Statement of then-Chairman Powell.

[16] *See, e.g.*, Verizon Wireless, *Products: Samsung SCH-a650*, *at* http://www.verizonwireless.com/b2c/store/controller?item=phoneFirst&action=viewPhoneDetail&selectedPhoneId=1561; Cingular Wireless, *Rate Plan Details: Optional Plan Features*, *at*

exception of data, moreover, all of these features are typically mandatory – *i.e.*, the consumer is required to take them when subscribing to the underlying wireless service – because that is the manner in which they can be most efficiently provided and in which the marketplace has demanded them. And the Commission has resoundingly affirmed "that there is effective competition in the CMRS marketplace," that "competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings," and that "competitive conditions in the CMRS marketplace are providing significant benefits to consumers by a number of performance indicators."[17] Moreover, wireless prices continue to decline, the average monthly minutes of use continue to grow, and "competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers."[18] In short, by any standard, competition in the wireless industry – which has taken the form of mandatory product bundles – is thriving.

The upshot of this highly competitive environment, in wireless and elsewhere, is consumer choice on a scale previously unheard of in the communications environment. No longer constrained to their traditional silos, service providers now aim to attract consumers – and keep them – with packages of services that meet all of their needs. And consumers are responding. Service "[b]undles are proving increasingly popular with consumers as they add value by improving the consumers' experience and typically offer savings of 10-15% from

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http://onlinestorez.cingular.com/cell-phone-service/wireless-phone-plans/plan-details.jsp?dtab=optfeat&skuid=csku00020.

[17] News Release, FCC, *FCC Adopts Annual Report on State of Competition in the Wireless Industry* at 1-2 (Sept. 9, 2004) ("*FCC Wireless Report News Release*").

[18] *Id.* at 2.

standalone pricing."[19] A recent survey reported that just under half of all U.S. households are "interested in a single provider for most or all of their communications services,"[20] and another documented that 51 percent of households *already* bundle at least two such services, up from 26 percent in 2002.[21] Critically, "customers who bundle services report higher overall satisfaction than those who are not bundling services."[22]

This Commission, moreover, has repeatedly emphasized the consumer benefits of product bundles. Thus, for example, the Commission has properly attributed the "astounding growth of wireless services" in part "to the Commission's deregulatory approach to these services" and wireless providers' resulting ability "to offer bundled local and long-distance packages."[23] The Commission has likewise emphasized that wireline carriers now offer "flat-rated 'bundles' of two or more services" that "are dramatically different than the retail offerings that existed prior to the 1996 Act."[24] And, as Chairman Martin has explained, such bundling is unmistakably pro-competitive, as competitors of all shapes and sizes spur one another "to provide better services, at low prices, in more attractive bundles," with customers reaping the

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[19] Peter Rhamey, BMO Nesbitt Burns Research, *V^2oIP – Going Beyond Voice* at 2 (Oct. 8, 2004). *See also* Craig Moffett, *et al.*, Bernstein Research Call, *Broadband Update: Dial-Up Conversion Still Accelerating, with No End in Sight* at 5 (Dec. 2, 2004) ("The communications bundle of telephone, cable, wireless phone, and Internet access has been growing as a percentage of disposable income nationally for some time.").

[20] News Release, Yankee Group, *Yankee Group Survey Reveals Changing Consumer Behaviors as Communications Markets Converge* (Nov. 8, 2004).

[21] Press Release, J.D. Power and Associates, *J.D. Power and Associates Reports: More Than One-Half of Households Now Bundle Their Long-Distance Service with Another Telecommunications Product* (July 1, 2004).

[22] J.D. Power Release.

[23] Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 18 (2005).

[24] *Id.* ¶ 19 (internal citations omitted).

rewards: "[m]any are paying 30% less for the same or similar telecom services – saving $15 per month on average."[25] As Chairman Martin has summarized, "[s]elling consumers such a 'bundle' of services . . . creates a more satisfied customer base that is less likely to leave to the competition."[26]

While that is undoubtedly the case for all communications services available in the market today, moreover, it is especially so for broadband services. The Commission has observed that "the pairing of Internet access services" with other services represents "[t]he most significant convergence of service offerings" developed and deployed in the wake of the 1996 Act.[27] As noted above, cable operators were first-to-market with a broadband Internet access offering, which they aggressively market bundled with traditional video and increasingly with voice. ILECs and CLECs followed with DSL-based broadband service offerings bundled with voice, and the satellite providers joined the fray with "one-way and two-way satellite-delivered Internet service."[28] In addition, "[m]any MMDS and private cable operators also offer Internet access services."[29] *All* of these providers, moreover, "continue to build advanced systems specifically to offer a bundle of services, including video, voice, and high-speed Internet access."[30]

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[25] Martin NARUC Conference Remarks.

[26] Kevin J. Martin, Commissioner, FCC, *Cable Television in the United States: Trends and Challenges*, Presentation before the 5th Sino-International Cable TV Executive Management Conference, Beijing, China (Aug. 26, 2004).

[27] Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, ¶ 14 (2004).

[28] *Id.*

[29] *Id.*

[30] *Id.*

All of this, of course, is fully consistent with Congress's vision in enacting the 1996 Act. As the Commission itself has repeatedly declared, the 1996 Act is "designed to ensure competition in all telecommunications markets."[31] By eliminating exclusive franchises and other legal restrictions on entry, the 1996 Act allows ILECs, cable operators, and others not only to challenge one another in their traditional strongholds, but also contemplates competition on equal terms in the creation and development of new markets, regardless of the technology they might use.[32] That competition has taken the form of product bundles that offer consumers unprecedented choice and lower prices. As Commissioner Abernathy has succinctly put it, "bundling is a boon for consumers."[33]

[31] *See* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 2 (1999).

[32] *See, e.g.*, Sixth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, ¶ 10 (2000) (the 1996 Act "removed barriers to LEC entry into the video marketplace in order to facilitate competition between incumbent cable operators and telephone companies"); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Asmernd Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.7-29.5 GHZ Frequency Band, To Reallocate the 29.5-30.0 GHZ Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, , 15 FCC Rcd 11857, ¶ 8 (2000) ("*Fixed Wireless Competition Order*") (noting "the 1996 Act's mandate to stimulate competition in telecommunications markets with a minimum of regulatory interference") (footnote omitted).

[33] Abernathy Univ. Colo. Remarks. *See also* Kathleen Q. Abernathy, Commissioner, FCC, *20 Years After Divestiture: Looking Back and Looking Forward*, Remarks before the Association of the Bar of the City of New York, New York, NY, 2004 FCC LEXIS 1334, at *4-*5 (Mar. 15, 2004) (In the wake of the 1996 Act, "[p]rices have fallen dramatically, and carriers have increasingly focused on improving service quality and offering innovative bundles. . . . The bundling of local and long distance minutes by wireless carriers, and now emulated by wireline carriers, would not have occurred without competition.").

B. Broadband Bundling Promotes the 1996 Act's Goals of Broadband Deployment, the Provision of New Services, and the Development of the Internet

Apart from fulfilling Congress's overarching goal of intermodal, facilities-based competition, broadband service bundles also promote the statutory objectives – set forth in the plain language of the 1996 Act – of broadband deployment, the continued development of the Internet, and the provision of new technologies and services to the public.

First, section 706 of the 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability" and to "remove barriers to infrastructure investment." 47 U.S.C. § 157 note. Consistent with this unambiguous mandate, the Commission has resoundingly embraced the deployment of broadband infrastructure as "the central communications policy objective of the day," because "ubiquitous broadband deployment" is likely to "bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public."[34] Moreover, in March 2004, President Bush announced that it was the administration's objective to achieve "universal, affordable access for broadband technology by the year 2007," and explained that broadband technology "will enhance our Nation's economic competitiveness and will help improve education and health."[35]

Product bundles are absolutely critical to that objective. Although broadband deployment and subscribership have surged in recent years – as providers such as SBC have invested

[34] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, ¶ 1 (2002).

[35] White House, *Executive Summary, Promoting Innovation and Competitiveness, A New Generation of American Innovation* (Apr. 26, 2004), *at* http/www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html.

enormous sums to expand broadband availability – much work remains to be done. Indeed, the Commission recently reported that the United States – which once boasted broadband deployment and penetration rates unmatched elsewhere – has slipped to 11th in overall broadband penetration, and as low as 18th in DSL penetration.[36] To reverse that trend, companies will be required to continue, and even accelerate, the staggering investments necessary to expand broadband availability and deploy new and innovative services. SBC, which has already spent billions upgrading its networks to make broadband services available to consumers that were previously out-of-reach, recently announced the investment of billions more to extend fiber deep into the network, make available a bevy of new services, and trigger an "intensifying battle for the broadband home."[37] Yet that investment – which section 706 explicitly directs the Commission to "encourage" – can be justified only if it can be recovered in the marketplace. And that recovery in the marketplace, in turn, will occur only if SBC is permitted to use that expanded pipe to provide service offerings in an economic and efficient manner, packaged in the way that consumers demand.[38]

Second, section 7 of the 1996 Act, 47 U.S.C. § 157, makes clear that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the

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[36] *See* Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, 20579 (2004).

[37] Richard Talbot, *et al.*, RBC Capital Markets, *SBC Communications Inc.: FTTN Deployment Update* at 2 (Nov. 15, 2004).

[38] *See, e.g.*, Viktor Shvets, *et al.*, Deutsche Bank, *FTTP – No Other Way to Entertain* at 40 (May 13, 2004) (noting that "the RBOCs' consumer business is under unprecedented siege from the cable industry on one side and independent VoIP providers on the other," and stating that "the only way to break out . . . is by upgrading . . . infrastructure to fiber, followed by an aggressive rollout of entertainment products. This is the only way that they can 'right size' the voice cost base, as well as compete toe-to-toe with the integrated cable triple-play").

public."[39] Just as the continued investment by broadband service providers such as SBC is critically important to the fulfillment of the Commission's section 706 mandate, so too is that investment essential to the provisioning of new technologies and services to the public as contemplated by section 7.

Third, broadband bundles are consistent with the 1996 Act's express directive to promote the Internet through deregulatory policies. Recognizing that "the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," Congress emphatically established that "the policy of the United States" is to "promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(4), (b)(1), (b)(2). As explained above, broadband service bundles are a core feature of the "vibrant and competitive free market" that exists for the Internet today. If the Internet is to continue to develop as Congress intended, in a "vibrant and competitive" manner "unfettered by Federal or State regulation," providers must retain the flexibility to develop and deploy services in a cost-effective, efficient manner and in the packages that consumers demand.

C. Bundling Creates No Adverse Competitive Consequences

As the *NOI* observes, commenters on BellSouth's declaratory ruling petition claimed that the specific bundling policy at stake in that petition – *i.e.*, BellSouth's practice of offering xDSL-based Internet access only as part of a bundle, to customers that also received voice service from

[39] *See also* Memorandum Opinion and Order, *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 18 n.67 (2004).

BellSouth – was anticompetitive. In particular, commenters alleged that BellSouth's policy required customers to purchase a service that they did not want, and that it frustrated the development of new services that rely on a broadband connection to the home. Neither claim is supported by evidence or sound reasoning.

First, it is simply wrong to suggest "that bundling services potentially harms competition because consumers have to purchase redundant or unwanted services." *NOI* ¶ 37. While the market for converging services is in its early stages and continues to evolve, the truth of the matter is that, in the current environment, consumers do *not* have to purchase "redundant or unwanted services." As the array of choices for service bundles continues to expand, so too does the ability of consumers to customize their service packages, including the ability to purchase individual services from different providers. Customers that want a standalone voice service can obviously obtain it from the ILEC serving a particular area as well as from any competitive providers, including wireless carriers, that choose to offer such a service in that area. Likewise, to the extent consumers desire a standalone broadband Internet access service, the marketplace is delivering and will continue to do so, provided there is regulatory freedom. Thus, for example, all of the major cable operators already offer standalone broadband to those consumers that want it (though most do so at a higher price than when bundled with video service and/or voice service).[40] Fixed wireless providers have begun to offer standalone broadband to residential

[40] *See, e.g.*, Cablevision, *Products and Services, Optimum Online, at* http://www.cablevision.com/index.jhtml?pageType=ool_product; Comcast, *Frequently Asked Questions: Do I Need to Have Cable TV to Get Comcast High-Speed Internet?, at* http://www.comcast.com/Support/Corp1/FAQ/FaqDetail-476.html; Cox Communications, *Rates: Fairfax, VA, at* http://www.cox.com/Fairfax/Rates.asp; Time Warner, *Rates: Manhattan, at* http://www2.twcnyc.com/downloads/rate_nm.pdf; Charter, *Charter High-Speed, at* http://www.charter.com/products/highspeed/value.aspx.

customers in certain areas of the country.[41] ILECs, as well, will offer a standalone DSL-based service if the market demands it; indeed, several ILECs have indicated that they are developing such an offering.[42] And CLECs, if they see a market for it, are entitled to use unbundled copper loops to provide standalone broadband, which is an arrangement the Commission made available specifically because it "creates better competitive incentives than the alternatives"[43] and which at least one CLEC appears to be taking advantage of in partnership with one of the nation's largest independent ISPs.[44]

Moreover, far from inhibiting consumer choice, the ILECs' ability to offer xDSL solely as part of a bundle expanded it, by permitting DSL to become a meaningful competitive alternative to the dominant cable incumbents. As noted above, the cable incumbents were the first providers to roll out broadband on a widespread basis, and, by 2000, they boasted a greater than two-to-one subscribership lead over xDSL-based providers.[45] But, while cable remains the dominant provider of broadband, DSL has made gains, by one estimate increasing its share from under 30 percent in the first quarter of 2002 to 35 percent at the end of 2004, with additional increases expected through the end of this year.[46]

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[41] *See, e.g.*, NTELOS, *Residential Internet and Phone, Internet Services, at* http://www.ntelos.com/wireline/r_internet.html; America Connect, *Residential Products and Services, at* http://www.aconnect.net/residential.asp.

[42] *See infra* pp. 18-19.

[43] Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 260 (2003) ("*Triennial Review Order*") (subsequent history omitted).

[44] *See* Earthlink/Covad Press Release.

[45] *See* Ind. Anal. & Tech. Div., WCB, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at Table 1 (Dec. 2004).

[46] *See* Craig Moffett, *et al.*, Bernstein Research Call, *Broadband Update: Broadband Trending Towards 100% of Internet Connections; Cable's Share Advantage Narrowing* at 8

These gains, however, would not have been possible but for the ability to bundle broadband with voice. When ILECs first developed and deployed a consumer broadband product, they faced enormous risk. The cable providers were already in the market signing up customers in droves, and it was far from clear that consumers would find an xDSL-based product an acceptable substitute. Moreover, the ILECs alone faced (and continue to face) the substantial costs of complying with the legacy regulation – including antiquated price regulation and accounting rules and the obligations under the *Computer Inquiry* framework – that the Commission has held apply to ILEC broadband services. Although DSL-based Internet access is clearly a competitive offering, these legacy obligations effectively worked to deter ILECs from investing in it, by requiring that an underlying wholesale transmission product be developed and offered at regulated rates, terms, and conditions to unaffiliated ISPs. In contrast, when offering cable modem service, the dominant broadband providers – cable companies – were (and remain) free to price the retail offering at whatever price they chose and faced no wholesale obligation to sell the stand-alone service to unaffiliated ISPs. And ILECs also faced the possibility that their investment in broadband would be undercut by a requirement that they unbundle, at TELRIC rates, the network facilities developed and deployed for broadband.

Notwithstanding these substantial costs and risks, ILECs undertook the substantial investment necessary to bring to market a line-shared xDSL-based Internet access product to be sold to customers of the ILECs' voice service. Designing and deploying the product in this way permitted ILECs to obtain economies of scope that allowed them more quickly to deploy service

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(Mar. 15, 2005). *See also* Doug Colandrea & Anthony McCutcheon, Bear Stearns, *The Broadband/Digital Monitor – 4Q04 Update* at 2 (Mar. 30, 2005) (reporting that DSL won more net adds than cable in the first, second, and fourth quarters of 2004).

and thus more quickly to become a viable competitor to cable. It also made perfect sense, since, at the time, there was little indication that consumer demand would justify the additional costs necessary to deploy a standalone broadband product. Given the competitive nature of broadband – as well as the costs that ILECs alone face as a result of disparate regulation – it is thus hardly surprising that ILECs did not generally incur the added expense of developing a new (and more expensive) standalone DSL product for which demand might well be limited, but which would face the same regulatory costs and obstacles as the bundled product. What made DSL service a viable competitor to cable modem service was the price at which it could be offered as a part of a bundle, a point that is reinforced by SBC's recent decision to reduce the DSL component of its voice/data bundle to $14.95 per month, in part in response to the competitive pressure brought to bear by the cable providers' aggressive marketing of "bundled cable modem/telephony service."[47]

Furthermore, in response to consumer demand – driven in large part by the development of broadband applications such as VoIP – that was not apparent when ILECs first deployed xDSL service bundled with voice, most of the major ILECs have indicated that they are now making the investments necessary to offer a "naked" xDSL-based broadband offering. For example, Verizon recently announced "that it would allow current customers in 13 Northeast states to drop telephone service but continue to get high-speed Internet access through [DSL],"[48]

[47] David M. Dixon, *et al.*, RBC Capital Markets, *Integrated Telecommunications Services: SBC Reprices DSL Service to $14.95/month – Industry Implications* at 1 (June 1, 2005).

[48] Matt Richtel, *Some Verizon Customers to Get Stand-Alone D.S.L.*, NY Times at C7 (Apr. 19, 2005).

and Qwest has done the same throughout its service area.[49] In addition, SBC told analysts that it is contemplating trials of xDSL-based Internet access to customers that do not purchase wireline voice service from SBC.[50] The ILECs are making these decisions, moreover, even in the face of the disparate regulation (such as the accounting and *Computer Inquiry* requirements noted above) that deter investment in broadband.

The reality is thus that broadband consumers *cannot* be forced to "purchase redundant or unwanted services." *NOI* ¶ 37. The "fierce competition" in the market, rather, ensures that service providers will develop and deploy service as consumers demand and as technology permits, as the ILECs' own evolving broadband strategies demonstrate.

Second, there is no colorable claim that mandatory broadband bundling harms the deployment of new services, such as VoIP, that require a broadband connection. *See NOI* ¶ 37. On the contrary, for the reasons explained above, the ability to deploy DSL solely as a line-shared product in fact accelerated broadband deployment and thus made broadband-based services available to more customers than would otherwise be the case.

The proof of this is in the numbers. Just as broadband deployment has accelerated in the past year, so too have the subscribership figures for VoIP. Over the past year, cable providers have deployed VoIP to more than a third of their serving areas, and they are expected to cover 80 percent of United States households by the end of 2006.[51] Today, cable operators are using VoIP

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[49] *See* Qwest Press Release, *Qwest First Major Telecom Company To Offer Stand-Alone DSL Service* (Feb. 25, 2004).

[50] *See* Marguerite Reardon, *SBC Plans to Get 'Naked'*, CNET News (May 6, 2005), *available at* http://news.com.com/SBC+plans+to+get+naked/2100-1034_3-5698066.html.

[51] *See* Jeffrey Halpern, *et al*., Bernstein Research Call, *US Telecom 1Q05 Review: Broadband, Wireless Growth Highlight Positives; Access Lines Start to Show VoIP Impact* at 4,

to sign up approximately 400,000 customers each quarter – a number that "could easily double . . . within the next twelve months."[52]

Nor is this trend limited to facilities-based VoIP providers. Vonage, the largest of the independent VoIP providers, now serves more than 600,000 VoIP subscribers, and continues to add more than 15,000 customers *every week*.[53] Vonage's CEO proudly announced last month that "Vonage is leading the telecommunications revolution, as its full-featured, cost-effective calling plans are prompting hundreds of thousands of people to drop their traditional Bell telephone service."[54] In April 2005, Skype announced the 100-millionth download of its software, boasting that it "has now enabled more than 7 billion high-quality minutes of talk time" for its 35 *million* registered users worldwide (a figure that Skype claims is increasing by "more than 150,000 new users per day").[55] And 8x8, another independent provider, recently reported subscriber growth in the first quarter of over 40 percent versus year end 2004.[56] Indeed, it is the very popularity of these services that is dictating ILECs' decision to develop and deploy a

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Exh. 2 (May 9, 2005); Craig Moffett, *et al., Quarterly VoIP Monitor: How High Is Up for Cable VoIP?* at 4, Exhibit 2 (Mar. 24, 2005).

[52] Viktor Shvets & Andrew Kieley, Deutsche Bank, *The Hotline: 1Q05 Wireline Post-Mortem* at 5 (May 9, 2005).

[53] Press Release, Vonage Holdings Corp., *Vonage Contracts with Verizon for Nomadic VoIP E9-1-1 Service* (May 4, 2005). *See also* Press Release, Vonage Holdings Corp., *Vonage to Exhibit at NCTA's National Show in Booth #4038* (Apr. 12, 2004) (noting that Vonage currently offers service in 1,900 rate centers in over 120 North American markets).

[54] Press Release, Vonage Holdings Corp., *Vonage Completes $200 Million Financing Round* (May 9, 2005).

[55] Press Release, Skype, *SkypeIn and Skype Voicemail Beta Premium Services Launch as Skype Hits 100 Million Downloads* (Apr. 15, 2005).

[56] *See 8X8 Post Strong Customer Growth, Larger Losses*, TR Daily (May 25, 2005) (8X8 reported "the addition of 17,000 activated subscriber lines in the most recent quarter, to a period-ending total of 57,000.").

standalone broadband product. In any case, these are hardly the signs of an industry repressed by the ILECs' practice of selling broadband bundled with voice.

II. THE COMMISSION SHOULD NOT AS A MATTER OF POLICY, AND MAY NOT AS A MATTER OF LAW, MANDATE THE PROVISION OF A STANDALONE BROADBAND INTERNET ACCESS SERVICE

The Commission seeks comment on its "authority to impose remedies" to redress "any potential competitive concerns" arising from mandatory broadband bundling. *NOI* ¶ 37. The most obvious proposed "remedy" – the one that commenters advocated in response to BellSouth's petition – is the forced provision of a "naked" broadband Internet access product to consumers that do not subscribe to additional services. But, as the above discussion makes clear, there are no competitive concerns associated with broadband bundling, and there is accordingly no reason for the Commission to intervene in the market to force providers to make available any broadband service. Moreover, even if that were not the case – *i.e.*, even if there were some plausible competitive concern at stake here – the Commission could not force carriers to provide a "naked" broadband Internet access product.

A. As an initial matter, since there is no coherent basis for singling out the nondominant wireline carriers from the other, multiple broadband service providers in the market, any decision by the Commission to compel a "naked" broadband Internet access product *would necessarily apply across-the-board, to all providers of broadband Internet access*. That means that *all* service providers in the market – the dominant cable incumbents, ILECs and CLECs, fixed wireless providers, satellite service providers, power companies – as well as any other providers contemplating entry would be foreclosed by Commission fiat from bundling their

services as the market demands and would instead be required to make available a standalone product irrespective of whether consumer demand warrants it.

Such heavy-handed intervention is plainly inappropriate here. The Commission has long-recognized that, in the words of Chairman Martin, "competition is preferable to regulation."[57] That is to say, "[m]arket forces are the best method of delivering choice, innovation, and affordability to consumers," and the Commission should only "step in and take action" where there are "market failures."[58] This standard for intervention is not even close to being satisfied here. As Chairman Martin recently stressed, "the growth of cable broadband and DSL lines has resulted in fierce competition between these services, with cable still significantly ahead of its telco competitor."[59] In addition, both cable and DSL face competition from other transmission

[57] *Press Statement of Commissioner Kevin J. Martin on the Commission's Decision on Verizon's Petition for Permanent Forbearance from Wireless Local Number Portability Rules* (July 16, 2002).

[58] *Id.* Other commissioners have made the same point. *See* Kathleen Q. Abernathy, Commissioner, FCC, *Regulating Wireless: How Much and by Whom*, Luncheon Remarks, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C. (May 13, 2004) ("I've concluded that the force of an efficient marketplace is generally more effective than regulation in prompting firms to offer better services at lower prices. When dealing with a well-functioning market, regulators can do the most good when they simply allow the market to work to its best effect. Under these circumstances, maximizing consumer welfare demands that regulators resist adopting prescriptive regulation, and act only where structural barriers to competition exist, where legislation or overriding policy priorities require it, or where market forces fail to protect the public interest."); Jonathan S. Adelstein, Commissioner, FCC, *Accessing the Public Interest*: *Keeping America Well-Connected*, Remarks Before the 21st Annual Institute on Telecommunications Policy & Regulation, Washington, D.C. (Dec. 4, 2003) ("[T]o the greatest extent possible, we should let innovation and the marketplace drive the development of spectrum-based services. My goal is to maximize the amount of communications and information that flow over the Nation's airwaves, on earth and through space.").

[59] Martin NARUC Conference Remarks.

platforms, including satellite,[60] fixed wireless,[61] and broadband-over-power-lines.[62] Thus, just as with wireless, which likewise is characterized by mandatory product bundles, "competitive pressures [will] continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers."[63]

It is imperative that these "competitive pressures," not regulation, be permitted to drive the evolution of broadband service offerings. The technological transformation wrought by the evolution of the Internet and IP-based services is moving at lightning speed, and service providers are making enormous investment decisions in order to realize the promise of broadband. The Commission has observed that "regulatory uncertainty . . . in itself may discourage investment and innovation" in broadband.[64] That is precisely correct. Commission intervention in this fast-evolving market would serve only to distort investment decisions and frustrate the workings of the market, to the detriment of consumers and the industry alike.

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[60] *E.g.*, Roger Brown & Jeff Baumgartner, *Smooth Sailing or the Perfect Storm?*, CED (Jan. 2004), *at* http://www.cedmagazine.com/ced/2004/0104/id1.htm (forecasting that "satellite broadband [would] be on the upswing again in 2004").

[61] *See* Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783, A-4 n.709 (2003) (estimating that residential fixed-wireless Internet access is available in counties that contain approximately 62 million people, or 22% of the U.S. population).

[62] *See* Notice of Proposed Rulemaking, *Carrier Current Systems, Including Broadband over Power Line Systems*, 19 FCC Rcd 3335, ¶ 1 (2004) ("[W]e believe that these new systems, known as Access broadband over power line or Access BPL, could play an important role in providing additional competition in the offering of broadband services to the American home and consumers, and in bringing Internet and high-speed broadband access to rural and underserved areas.").

[63] *FCC Wireless Report News Release* at 1.

[64] Declaratory Ruling and Notice of Proposed Rulemaking, *inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 5 (2002) ("*Cable Modem Declaratory Ruling*").

That is especially so, moreover, in view of the fact that broadband Internet access is an unregulated information service.[65] The Commission has long recognized, based on "[e]xperience gained from the competitive evolution of varied market applications of computer technology offered since the *First Computer Inquiry*," that regulation of such services "is simply unwarranted."[66] In fact, with the notable exception of ILEC broadband offerings – which continue to labor under legacy regulation – the Commission has spent much of the last three decades ensuring that such services remain free from regulation at all levels, reasoning that such an approach would realize "the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network."[67] The Commission, in short, has resolved "to permit competitive forces, not government regulation, to drive the success of [the information services] industry," and "the success of the Internet today, is, in part, a direct result" of that policy.[68]

A determination to force the provision of standalone broadband Internet access would be a startling repudiation of that long-established policy. Instead of "permit[ting] competitive forces . . . to drive" the market, the Commission would be undertaking heavy-handed, centralized

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[65] *See id.* ¶ 41; Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 73 (1998); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 34 (1999) (subsequent history omitted). *See also* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) (tentatively concluding that xDSL-based broadband Internet access is solely an "information service").

[66] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 128 (1980) (subsequent history omitted).

[67] *Id.* ¶ 7.

[68] *See* Jason Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet*, at 6 (OPP Working Paper No. 31, July 1999).

regulation: the determination of who has to provide which service in what circumstances. Indeed, if it were to force provision of standalone broadband, the Commission presumably would soon be tempted to become involved in pricing, in cost recovery for enhancements necessary to make it available, and in ensuring nondiscriminatory conduct in ordering, maintenance, and other functions, among many other things. Equally insidious, the Commission would be sending a message that the Internet – which the Commission has previously struggled to keep free from regulation – is fair game for competitors seeking a regulatory advantage to make up for any shortcomings they are experiencing in the marketplace.

A decision by the Commission to compel naked broadband would thus embroil the Commission in the kind of heavy-handed regulation that it has consistently rejected in the information services context and that is no more appropriate here than it is in the highly competitive wireless environment.[69] It is difficult to conceive of a result more out-of-keeping with the "pro-competitive, de-regulatory" framework Congress sought to establish in the 1996 Act.[70] The Commission should be striving to eliminate regulatory obstacles to investment and to create a coherent broadband regulatory structure, not erecting new regulatory hurdles that would serve only to distort the market.

B. Even if the Commission were to conclude that the forced provision of "naked" broadband Internet access is sound policy, it lacks the authority to require such an offering.

[69] *Cf. Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd 8987, ¶¶ 19-20 (2002) (rejecting price discrimination claim against wireless carrier on the ground that, in light of "vibrant competition" among providers, "market forces protect . . . consumers"), *aff'd*, 352 F.3d 415 (D.C. Cir. 2003).

[70] S. Conf. Rep. No. 104-230, at 113 (1996).

Such a drastic mandate is foreclosed, first, by Commission precedent, which dictates that the *only* circumstance in which the Commission may compel the forced provision of service is in the presence of a bottleneck – *i.e.*, where such forced provision is necessary to mitigate a carrier's "market power."[71] Here, the Commission has repeatedly and consistently found that broadband is competitive,[72] and, where it has failed to properly consider those findings, the courts have intervened.[73] Because there is no market power in the broadband marketplace, there can be no plausible theory for, much less precedent to support, forcing broadband service providers to offer a standalone broadband product.

In addition to Commission precedent, the statutory directives in the 1996 Act foreclose the Commission from requiring provision of "naked" broadband. As explained above, the 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability" and to "remove barriers to infrastructure investment," while at the same time

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[71] Memorandum Opinion and Order, *AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, 13 FCC Rcd 21585, ¶ 9 (1998), *pet'n for review denied, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). *See generally* Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone* at 12 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[72] *See, e.g.*, Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816 ¶ 116 (2000) (noting "actual and potential competition" in broadband); *Fixed Wireless Competition Order* ¶ 18 ("An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services."); *Triennial Review Order* ¶¶ 262-263.

[73] *See USTA v. FCC*, 290 F.3d 415, 429 (2002) (vacating Commission's line-sharing rules due to its "naked disregard for the competitive context"), *cert. denied*, 538 U.S. 940 (2003).

authoritatively adopting as the "policy of the United States" the objectives of "encourag[ing] the provision of new technologies and services to the public," "promot[ing] the continued development of the Internet," and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[74] A Commission command to provide standalone broadband Internet access irrespective of whether the market demands it would conflict with each of these statutory mandates.

First, a rule mandating standalone broadband Internet access would frustrate, not encourage, the deployment of broadband infrastructure. All broadband providers – telephone companies, cable providers, fixed wireless providers, and power companies – are investing enormous amounts to deploy broadband infrastructure. As noted above, SBC in particular has announced plans to spend billions to extend fiber deep into the network in order to provide an array of new services to consumers and to compete head-to-head with the dominant cable incumbents' traditional video offerings. This investment decision – and others like it – is extremely risky: at the time the investment decision is made, SBC cannot know the demand for its new facilities; it may not even know precisely what services it will provide over them. SBC also cannot precisely gauge the extent to which consumers will prefer its competitors' offerings. When providers are forced to offer service that the market has not demanded, the business case for such investment can be destroyed. Such requirements – particularly when accompanied by regulated pricing – deny providers the fruits of their innovation and investment, and they raise costs by forcing the design of new infrastructure and back-office systems. In short, such

[74] *See supra* pp. 12-14 (quoting 47 U.S.C. § 157 & note; *id.* § 230(a)(4), (b)(1), (b)(2)).

requirements can eviscerate the return providers hoped to obtain on investment undertaken in the past, and undermine the case for new investment going forward, in direct conflict with the goals set out in section 706.[75]

Second, and for similar reasons, a mandatory "naked" broadband Internet access rule would undermine the 1996 Act's directive to promote "new technologies and services to the public."[76] If, for example, the uncertainty and increased costs associated with mandatory service offerings means that SBC cannot justify the investment necessary to create the fully integrated, end-to-end broadband network that it plans, then consumers will obviously be deprived of the new, IP-based "technologies and services" that such a network promises – a result in direct contravention of Congress's mandate to the Commission.

Third, forced provision of standalone broadband cannot be squared with the congressional policy of "promot[ing] the continued development of the Internet" and "preserv[ing] the vibrant and competitive free market that presently exists."[77] The Commission has emphatically declared the "strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet – which has flourished under our 'hands off' regulatory

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[75] *See* Third Report and Order and Fourth Notice of Proposed *Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, 15 FCC Rcd 3696, ¶ 316 (1999) (noting that section 706(a) counsels "regulatory restraint" so as "to further the [1996] Act's goal of encouraging facilities-based investment and innovation"); Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20913, ¶ 246 (2000) (explaining that, in carrying out its section 706 mandate to "stimulat[e] further deployment of advanced telecommunications capability," "competition, not regulation, holds the key");

[76] 47 U.S.C. § 157.

[77] *See* 47 U.S.C. § 230(a)(4), (b)(1), (b)(2).

approach – or the development of competition."[78] A decision to force service providers to make available standalone broadband, with all the regulatory burdens that such forced provision of service requires, would be a giant step backwards, in defiance of Congress's direct command to ensure that competitive forces, not regulators' preferences, continue to drive the development of the Internet.

III. COMMENTERS' ANTITRUST CLAIMS ARE MERITLESS

As they did in response to the BellSouth petition, commenters will no doubt contend that the mandatory bundling of xDSL-based broadband Internet access with local voice service violates the antitrust laws. Commenters will likely make two claims in this regard: first, that the product bundle is an unlawful "tying" arrangement in violation of section 1 of the Sherman Act; second, that the product bundle is an exclusionary practice that, when considered in connection with ILECs' purported market power in the local voice market, violates section 2 of the Sherman Act. Neither claim is remotely persuasive.

A. It is black-letter law that a claimant alleging tying under the antitrust laws must not only "identify the relevant market in which the tying product exists, [but also] allege that the seller has sufficient power within that market to be able to force buyers to purchase the tied product."[79] Commenters cannot do so here. The alleged tying product is xDSL-based Internet

[78] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, ¶ 6 (1999).

[79] *E.g.*, *General Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1355 (S.D. Fla. 2002); *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 37 (1984) (defendant "must have power in the tying-product market); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 443 (3d Cir. 1997) ("The first inquiry in any § 1 tying case is whether the defendant has sufficient market power over the tying product, which requires a finding that two separate product markets exist and a determination precisely what the tying and tied products markets are.") (internal quotation marks omitted); *see also Shell Oil Co. v. A.Z. Servs., Inc.*, 990

access, which is just one among many products in the highly competitive market for broadband Internet access, where ILECs plainly lack market power. As discussed above – and as the Commission has expressly recognized – cable modem service providers have been and remain the leading provider of broadband Internet access, with DSL a distant second.[80] And other platforms, including fixed wireless, satellite, and power lines, are increasingly providing a competitive substitute.

In light of these marketplace realities, commenters' tying claim lacks any foundation. In the face of alternative suppliers of broadband Internet access, ILECs cannot be said to "control prices or exclude competition" in broadband through their bundling of broadband Internet access and voice, as would be required in order to support a finding of market power.[81] Indeed, it is the *cable* providers, not xDSL-based providers, that control over 57 percent of the market.[82] "[A] predominant share of the market" is a necessary (though not sufficient) criterion to establish market power, and xDSL-based providers plainly do not have it.[83]

F. Supp. 1406, 1410 (S.D. Fla. 1997) ("an illegal tie can only occur where the seller has market power over the tying product and uses that power to coerce the buyer to buy the [tied] product"); *Newcal Indus. v. IKON Office Solutions, Inc*., No. C 04-2776, 2004 U.S. Dist. LEXIS 26229, at *17 (N.D. Cal. Dec. 23, 2004) (motion to dismiss granted due to plaintiff's failure to show "market power over a unique product or service that … customers require").

[80] *See, e.g., Cable Modem Declaratory Ruling*, 17 FCC Rcd, ¶ 9 ("Throughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology.").

[81] *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (internal quotation marks omitted); *see also* cases cited *supra* note 76.

[82] *See* Ind. Anal. & Tech. Div., WCB, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004* at Table 1 (Dec. 2004).

[83] *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 464 (1992).

Unable to counter these incontrovertible facts, commenters attempt to side-step them by contending that xDSL-based Internet access is, by itself, a discrete product market. But the Commission itself, like the FTC and the Department of Justice, has already concluded in effect that xDSL-based broadband Internet access is "reasonably interchangeable" with, and thus in the same market as, other broadband Internet access products.[84] Accordingly, carriers cannot be said to have market power in a properly defined market consisting of all reasonably interchangeable broadband services, which is an essential element of a tying claim.[85]

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[84] *See, e.g., Triennial Review Order* ¶¶ 262, 292; *Fixed Wireless Competition Order*, ¶ 23 ("the competitive nature of the broadband market," along with "the number of consumer broadband options within the various broadband technologies" and "price competition . . . in that market," means that neither incumbent LECs nor incumbent cable operators will "dominate the market"); *accord* DOJ Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.* at 9 (filed May 25, 2000) ("A relevant product market affected by [the AT&T/MediaOne] transaction is the market for aggregation, promotion, and distribution of broadband content and services."); Complaint, *In re America Online, Inc. and Time Warner Inc.*, Docket No. C-3989, ¶ 21 (FTC filed Dec. 14, 2000) ("The relevant product market in which to assess the effects of the proposed merger is the provision of residential broadband internet access service."). *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *Queen City Pizza*, 124 F.3d at 436 (dismissing action "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products"); *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1222 (11th Cir. 2002) (relevant market determined by "uses to which the product is put by consumers in general and whether there are interchangeable substitutes"), *cert. denied*, 537 U.S. 1190 (2003).

[85] Commenters' tying claim also fails to allege the existence of *separate* products that can be sold *separately*. A "tying arrangement cannot exist unless two separate product markets have been linked." *Endsley v. City of Chicago*, 230 F.3d 276, 284 (7th Cir. 2000) (quoting *Jefferson Parish*, 466 U.S. at 20-21). Here, the carriers that have not yet offered "naked" xDSL-based Internet access have never developed that product. *See generally United States v. Microsoft Corp.*, 147 F.3d 935, 948 (D.C. Cir. 1998) ("Antitrust scholars have long recognized the undesirability of having courts oversee product design"); *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (imposing requirement that defendant offer services would require "antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing -- a role for which they are ill-suited").

B. Just as SBC's decision to bundle DSL-based service with voice does not constitute unlawful tying, neither does it amount to exclusionary conduct in defense of alleged market power over local voice service.

As an initial matter, there can be no finding of exclusionary conduct – *i.e.*, the "willful acquisition or maintenance of . . . [monopoly] power" – if the practice at issue is pro-competitive.[86] The rationale for this settled principle is clear: when a company achieves a strong market position due to "growth or development as a consequence of a superior product, business acumen, or historic accident," consumers benefit.[87] Far from implicating section 2 of the Sherman Act, such behavior, even by "a monopolist," is "permitted, and indeed encouraged."[88] "[T]o compete aggressively on the merits" is the essence of pro-competitive behavior, and "any success that [a monopolist] may achieve through the process of invention and innovation is clearly tolerated by the antitrust laws."[89]

This principle is squarely applicable here. As noted above, SBC, like other ILECs, responded to the threat of cable's broadband service offerings by developing and deploying a line-shared DSL product available to voice customers. To the extent the development of that product created an advantage in the *voice* market, that reflects a legitimate effort to profit from the company's own efficiency and innovation, which is conduct that the antitrust laws are

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[86] *Independent Ink, Inc. v. Illinois Tool Works, Inc*., 396 F.3d 1342, 1353 (Fed. Cir. 2005) (citing *Trinko,* 540 U.S. 398).

[87] *Grinnell Corp.*, 384 U.S. at 571; *Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996) (same); *see also Van Dyk Research Corp. v. Xerox*, 478 F. Supp. 1268, 1324 (D.N.J. 1979) (innovation is "lawful [and] competitive . . . not . . . unlawful, anticompetitive or exclusionary").

[88] *Berkey Photo, Inc. v. Eastman Kodak Co*., 603 F.2d 263, 281 (2d Cir. 1979) (internal quotation marks omitted).

[89] *Id.*

specifically designed to encourage.[90] Indeed, the proper response to such a competitive advantage is not to condemn it, but is rather to force rivals to develop the scale, scope, or other assets necessary to match or exceed it. The Commission has embraced this precise point in the unbundling context – emphasizing that it is the responsibility of the requesting CLEC to "take full advantage of an unbundled loop's capabilities," by providing broadband service on its own or in partnership[91] – and it is equally applicable here.

More generally, in view of the "fierce competition" in the broadband market, it is implausible to conclude that bundling broadband with voice could somehow diminish competition for voice. As explained above, if consumers want a standalone broadband product, they can get it. In that circumstance, a decision by SBC willingly to forego the sale of such a product would drive customers into the arms of its competitors. Such economically irrational conduct cannot support a claim under the antitrust laws. As the courts have observed, "courts will not draw inferences to support a claim that makes no economic sense . . . . Rational economic actors do not ordinarily conspire to injure themselves."[92] And, again, the proof of this is in the numbers. As explained above, standalone broadband service is available in the market, and services – in particular VoIP – that rely on a broadband connection are flourishing. It is therefore untenable to claim that the deployment of DSL solely as a line-shared product in any way hampered competition for voice service.

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[90] *See, e.g., id.* at 274 (the law "does not condemn one 'who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well'") (quoting *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)) (alteration in original).

[91] *Triennial Review Order* ¶ 270.

[92] *See Spectators' Commuications Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 219-20 (5th Cir. 2001).

CONCLUSION

Communications service bundles – including the bundling of broadband Internet access service with legacy services – are enormously pro-competitive. There is no cause for the Commission to intervene in the market.

Respectfully submitted,

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